



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF UCE-C-

DATE: NOV. 3, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, nonprofit provider of day care and educational services, seeks to employ the Beneficiary as an instructional coordinator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advance degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the Petitioner's required intention to employ the Beneficiary in a permanent, full-time position. The Director also invalidated the accompanying labor certification upon concluding that the Petitioner had willfully misrepresented a material fact regarding the nature of the offered position.

On appeal, we reinstated the labor certification and held that the Petitioner had established that the position offered constituted a *bona fide* job offer. However, we held on appeal that the Petitioner had not provided sufficient evidence to establish the transfer of ownership of the petitioning entity or that the Petitioner established its ability to pay the proffered wage.¹ The Petitioner filed a motion to reopen, and we denied the motion and affirmed our decision dismissing the appeal.² The Petitioner then filed a motion to reconsider and we denied the motion, again holding that the Petitioner had not established its purported new owner as its successor-in-interest or that it had the ability to pay the proffered wage.³

The Petitioner has now filed a motion to reopen and a motion to reconsider our prior decision. Upon review, we will deny the motions.

¹ *See Matter of UCE-C-*, ID# 13696 (AAO Apr. 4, 2016).

² *See Matter of UCE-C-*, ID# 47197 (AAO Jan. 26, 2017).

³ *See Matter of UCE-C-*, ID# 462628 (AAO Jun. 23, 2017).

I. REGULATORY REQUIREMENTS FOR MOTIONS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret “new facts” to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute “new facts.”

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services or Department of Homeland Security policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

At issue in this matter is whether any new facts or arguments made on motion overcome our previous findings that the Petitioner did not establish that: (1) its ability to pay the proffered wage; and (2) the existence of a successor-in-interest.

For the reasons discussed below, we will deny the combined motion. Although the Petitioner has attempted to clarify some evidence that was at issue in our prior decision, it has not established eligibility for the benefit sought.

A. Ability to Pay

A petitioner must demonstrate its continuing ability to pay the proffered wage to the beneficiary as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). On motion, the Petitioner states that it has the ability to pay the Beneficiary’s proffered wage of \$36,525 as shown by the wages paid to the Beneficiary and its net assets which exceed the proffered wage. First we note that for the years considered, 2010 through 2014, the only year that the Beneficiary’s Form W-2 stated wages higher than the proffered wage was in 2012. Next, as discussed at length in our prior decisions, in order to use assets to establish the ability to pay the proffered wage, the evidence must demonstrate net *current* assets. The Petitioner’s IRS Form 990, Return of Organization Exempt from Income Tax, do not state net *current* assets. Part X of the Form 990 includes the Petitioner’s balance sheet, listing the Petitioner’s assets and liabilities in order of their liquidity, but the balance sheet does not indicate which assets and liabilities are current.⁴ In addition, as noted in our prior decisions, the Petitioner’s tax returns do not state sufficient levels of net income (net revenue) to demonstrate the ability to pay

⁴ If the Petitioner intends to rely on its net current assets, which are not stated on its tax returns, then it must submit audited balance sheets.

the proffered wage, nor does the record establish the Petitioner's ability to pay in the totality of the circumstances. Therefore, the Petitioner has not provided sufficient evidence on motion to establish that it has the ability to pay the proffered wage. The Petitioner's submission on motion does not overcome our previous finding.

B. Successor-in-Interest

In addition, the Petitioner has not submitted evidence regarding its transfer of ownership. For immigration purposes, the purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business. *See generally* 19 Am.Jur.2d *Corporations* § 2170 (2010). We indicated previously that the evidence in the record indicates that the Petitioner sold its assets to an individual, but it is unclear whether the job opportunity remains with the Petitioner or that individual. In addition, the evidence shows that the Petitioner was organized as a public benefit corporation under California law and that under federal tax law the assets of a public benefit corporation must be dedicated to charitable purposes and cannot be distributed for private gain.⁵ We stated previously that the evidence in the record does not establish that the sale was completed in accordance with federal tax law and that the Petitioner's assets have not been distributed to an individual person for private gain. The Petitioner has not submitted sufficient evidence on motion to resolve this issue.

We also held previously that line 32 of Part IV of the Petitioner's IRS Form 990 indicates that it did not "sell, exchange, dispose of, or transfer more than 25% of its net assets" in 2015 which contradicts the asset purchase agreement in the record. On motion, the Petitioner now states that its accountant inadvertently failed to record the transfer of the business on the Form 990. While we note that this may have been an inadvertent omission, we indicated previously that the Petitioner should submit evidence in any further filings regarding the claimed transfer of ownership. We indicated that this documentation should include a copy of the Petitioner's Articles of Incorporation and Bylaws; the IRS determination letter for its 501(c)(3) status; a list of the corporation's members, officers, and directors in 2014, 2015, and 2016; and evidence demonstrating that any sale or transaction pertaining to the transfer of ownership complies with federal law. The Petitioner did not submit this documentation on motion or other similar evidence to establish a successor-in-interest relationship. Therefore, the record does not establish that the successor-in-interest relationship has been established based upon the transfer of ownership of the petitioning entity. As the Petitioner's submission on motion does not overcome our previous findings, the motions must be denied.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration or established eligibility for the immigrant benefit sought.

⁵ *See* IRS, Inurement/Private Benefit – Charitable Organizations, <https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations> (last visited on October 31, 2017).

Matter of UCE-C-

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of UCE-C-*, ID# 808279 (AAO Nov. 3, 2017)